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No. 200

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

MICHELE H. BATES, DBA FRATELLI'S RESTAURANT,

Petitioner,

vs.

BOARD OF LIQUOR CONTROL
and
DEPARTMENT OF LIQUOR CONTROL,
STATE OF OHIO,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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QUESTION PRESENTED

The single question presented by this cause is whether the Court of Appeals of Franklin County, Ohio, could Constitutionally dismiss Petitioner's appeal for failure to prosecute it according to law and the rules of the court.

STATUTES ETC. INVOLVED

Section 2501.08 of the Revised Code of Ohio.

Rules of practice of the court of appeals.

The judges of the court of appeals, or a majority of such judges, may make and publish such uniform rules of practice, for all the districts, as are not in conflict with statute or the rules of the supreme court.

Section 2505.45 of the Revised Code of Ohio.

Power of courts to make rules.

The supreme court may make and publish rules with respect to the procedure in the supreme court not inconsistent with the laws of the state.

The several judges of the courts of common pleas and the courts of appeals shall make rules, not inconsistent with the laws of the state, for regulating the practice and conducting the business of their respective courts, which they shall submit to the supreme court. The supreme court may alter and amend such rules and make other rules necessary for regulating the proceedings in any court.

Section 2505.21 of the Revised Code of Ohio.

Hearing on Appeal.

Appeals taken on questions of law shall be heard upon assignment of error filed in the cause or set out in the briefs of the appellant before hearing. Errors not argued by brief may be disregarded, but the court may consider and decide errors which are not assigned or specified. Failure to file such briefs and assignments of error within the time prescribed by the court rules is cause for dismissal of such appeal. All errors assigned shall be passed upon by the court, and in every case where a judgment or order is reversed and remanded for a new trial or hearing, in its mandate to the court below, the reviewing court shall state

the errors found in the record upon which the judgment of reversal is founded.

An appeal taken on questions of law and fact entitles the party to a hearing and determination of the facts de novo which shall be upon the same or amended pleadings.

RULE VII

Court of Appeals of Ohio

BILL OF EXCEPTIONS, ASSIGNMENTS OF ERROR AND BRIEFS

(A) Appeals on Questions of Law in Civil Cases

(1) Bill of Exceptions

(a) If a bill of exceptions is required to portray the claimed error or errors in the proceedings below, it shall be filed in the cause in the trial court not later than forty (40) days after the perfecting of the appeal by the filing of notice of appeal within the time provided by Section 2505.07, Revised Code.

(b) When the authenticated bill of exceptions is filed with the Clerk of the trial court, he shall forthwith notify counsel for the respective parties of the filing thereof. Failure of the Clerk to comply with the provisions of this rule shall be deemed to be good cause within the meaning of the first paragraph of subdivision D of this rule. Within ten (10) days after the filing thereof with the Clerk of the trial court, the appellant shall file such bill of exceptions with the Clerk of the Court of Appeals.

(c) In accordance with the provisions of Section 2505.08, Revised Code, the cost of the production of the bill of exceptions shall be paid initially by the party perfecting the appeal, reimbursement therefor, if required, to be made in the assessment of costs by the Court.

(2) Assignment of Error and Briefs

Unless otherwise ordered by the Court or a Judge thereof, assignments of error and briefs shall be filed as follows:

(a) Within twenty (20) days after the filing of the bill of exceptions with the Clerk of the Court of Appeals, appellant shall file his assignments of error and brief. If a bill of exceptions is not required to portray the claimed errors, then appellant shall file with the Clerk of the Court of Appeals his assignments of error and brief within fifty (50) days after the perfecting of the appeal as required by Section 2505.07, Revised Code.

(b) Within fifteen (15) days after the filing of the appellant's brief, counsel for appellee shall file his brief and also at his election assignments of error on his behalf, and brief in reply thereto shall be filed within seven (7) days thereafter. The appellee's brief shall include such reasons and authorities in support of his assignments of error as he may desire, as well as an answer to appellant's brief. The appellant's reply brief may cover all matter in the appellee's brief.

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(D) Applicable to All Briefs

(1) Upon failure of the appellant to file his bill of exceptions, assignments of error, briefs or trial briefs as herein required, unless good cause is shown to the contrary, the cause will be dismissed for want of prosecution or otherwise disposed of at the discretion of the Court.

STATEMENT OF THE CASE

This case originated with an order of the Ohio Board of Liquor Control which suspended Petitioner's Ohio Liquor Permit privileges for a period of 56 days upon charges that she had violated a regulation of the Board. That order under Ohio's Administrative Procedure Act (Chapter 119., Revised Code of Ohio) was appealed to the Court of Common Pleas of Franklin County, where it was affirmed by an order journalized October 17, 1963 (Appendix A, p. 12, Petitioner's Brief). Thereafter, on November 5, 1963, Petitioner timely filed in the lower court her notice of appeal to the Court of Appeals of Franklin County. She did not, however, file a praecipe with the Clerk of Courts for preparation and transmission to the Court of Appeals of the transcript of the docket and journal entries and original papers in her case (which would have resulted in the docketing of her case in the Court of Appeals) nor did she take any other step in the prosecution of the appeal for over nine months.

On July 10, 1964, the Liquor Control Commission of Ohio, as statutory successor to the Board of Liquor Control, applied to the Court of Appeals for an order docketing the case and assigning it a number for the express purpose of having the appeal dismissed for failure to prosecute. The application to docket was granted; and, upon Respondent's subsequent motion, the appeal was dismissed in a decision which also denied a later motion by Petitioner for leave to file assignments of error and brief (Opinion and Journal Entry, Appendix A, pp. 15, 19, Petitioner's Brief). Appeal as of right to the Supreme Court of Ohio was denied upon the ground that no substantial constitutional question was presented, and motion to order the record certified for review was overruled (Journal Entries, Appendix A, pp. 21, 22, Petitioner's Brief).

REASONS FOR DENYING THE WRIT

The Courts of Appeals of Ohio are authorized by law to adopt uniform rules governing practice and the conducting of the business of the court (Sections 2501.08 and 2505.45, Revised Code of Ohio). Further, Section 2505.21, Revised Code of Ohio, specifically provides that failure to file briefs or assignments of error within the time prescribed by the court rules is cause for dismissal of the appeal, and this provision is incorporated in subparagraph (D)(1) of Rule VII of the Courts of Appeals.

Petitioner does not even argue that these statutory provisions or the court rules adopted pursuant to them infringe her Constitutional rights; and nothing is, or can be, presented here which remotely suggests that such rules have been used arbitrarily against her in violation of such rights. There is, therefore, nothing presented for the review by the Writ of Certiorari which Petitioner seeks.

CONCLUSION

The case clearly was decided upon an independent and adequate state ground alone. No federal question was, or could be, presented for decision below because of Petitioner's own dereliction in prosecuting her appeal in the state courts. Hence, no federal question can properly be presented here; and, it is therefore submitted that the petition for Writ of Certiorari must be denied.

Respectfully submitted,

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JAMES E. RATTAN,
Assistant Attorney General,
Counsel for Respondent.